COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Proceeding by the Department on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers	**D.T.E. 03-60**

REPLY COMMENTS OF VERIZON MASSACHUSETTS

INTRODUCTION

The Department's briefing questions present two basic sets of issues. First, given the D.C. Circuit's order in *USTA II*,[1] what remaining obligations does Verizon Massachusetts ("Verizon MA") have under Section 251(c)(3) of the Telecommunications Act of 1996 (the "Act") and its existing interconnection agreements to provide access to mass market switching, mass market UNE-P, high capacity loops and transport, and dark fiber? Second, does the Department have any authority under state law or alternative sources of federal law to require Verizon MA to provide access to those elements?

The answer to both questions begins with the D.C. Circuit's holdings in *USTA II* and the unusual remedy it granted. In the *Triennial Review Order*,[2] the Federal Communications Commission ("FCC") attempted to perpetuate incumbent local exchange carriers' ("ILEC") obligation to provide unbundled access to mass market

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1 *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

2 Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*" or "*TRO*"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

switching and high capacity facilities *not* by determining that requesting carriers would be impaired without access to those elements. Instead, the FCC made "provisional" findings of impairment with respect to those elements – because "the record could not support an absolute national impairment finding." *USTA II*, 359 F.3d at 563. The FCC then delegated to state commissions the ultimate task of determining whether particular network elements should be unbundled "under a purported delegation of the [FCC's] own authority." *Id.*

The D.C. Circuit vacated *both* aspects of the FCC's unbundling regulations. First, the D.C. Circuit held that the statute unambiguously requires *the FCC* to determine "what network elements should be made available for purposes of [section 251(c)(3)]." 47 U.S.C. § 251(d)(2); *see USTA II*, 359 F.3d at 565-68. The requirement that the FCC make this determination means that state commissions *cannot* lawfully assume that role under the Act. As the court noted, "other provisions of the statute carefully delineate a particular role for the state commissions, but § 251(d)(2) does not." *Id.* at 568. Second, the D.C. Circuit reversed the FCC's provisional finding of impairment with respect to both mass market switching and high capacity facilities – loops and transport – holding that the record the FCC had compiled could not support those nationwide findings. *See id.* at 571, 574. As a result, there is no basis for any continuing federal obligation to unbundle those elements.

The D.C. Circuit also took an unusual remedial step. Rather than simply remanding the order to the FCC for further proceedings, which is the norm if the court believes the agency can reinstate its rules on remand (and which the D.C. Circuit did with respect to other portions of the *Triennial Review Order*), the D.C. Circuit vacated the

unlawful unbundling rules, which renders them ineffective. That, in itself, is not out of the ordinary. But the court also temporarily stayed – *sua sponte* – the vacatur for no more than 60 days (or until denial of rehearing). While the court subsequently extended this date once with all parties' consent, it also made clear that the purpose of the stay was to give the FCC a brief window in which to adopt "lawful unbundling rules" or see incumbents' obligation to provide mass market switching and high capacity facilities immediately eliminated. *Id.* at 595. And in an extraordinary rebuke to the agency, the D.C. Circuit noted that its short "deadline is appropriate in light of the Commission's failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings." *Id.*

The issuance of the mandate in *USTA II* thus definitively eliminates any obligation that Verizon MA had under Section 251(c)(3) to unbundle those elements that are subject to the court's order of vacatur – at least until the FCC adopts new rules. *USTA II* itself held that state commissions cannot impose any such obligation under federal law. Accordingly, to the extent that Verizon MA's obligations under its interconnection agreements are limited to the provision of access to network elements as required under Sections 251 and 252 of the Act – and this is the case in most instances – Verizon MA simply has no further legal obligation to provide access to those elements. By the same token, to the extent that amendment of certain existing agreements may be useful to clarify that Verizon MA has no further obligation to provide access to those elements, the Department should promptly enforce the law.

Second, precisely because Congress has delegated to the FCC the task of determining what network elements should be unbundled, there is no room for state

commissions to impose unbundling in the absence of valid federal rules. As the Virginia State Corporation Commission recently explained, "*USTA II* establishes that no unbundling can be ordered in the absence of a valid finding *by the FCC* of impairment under 47 U.S.C. § 251(d)(2)."[3] And, in any event, nothing in Massachusetts law purports to give the Department such authority. Furthermore, to the extent Verizon may have obligations to provide access to certain elements under Section 271 – not at TELRIC but at higher rates – the FCC, and not this Department, is responsible for enforcement of those obligations.

As discussed below, the various commenters[4] would have this Department believe that the issuance of the mandate in *USTA II* changed nothing. They argue that the D.C. Circuit's opinion was simply an academic exercise that did not eliminate any federal unbundling obligations. That argument is plainly wrong, and the CLECs' desperate and failed efforts to secure a stay of the D.C. Circuit's mandate belie such claims. *USTA II* eliminates Verizon MA's obligation under Section 251 to provide access to network

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[3] Order, *Petition of Competitive Carrier Coalition for an Expedited Order the Verizon Virginia Inc. and Verizon South Inc. Remain Required to Provision Unbundled Network Elements on Existing Rates and Terms Pending the Effective Date of Amendments to the Parties' Interconnection Agreements; Petition or AT&T Communications of Virginia, LLC, and TCG Virginia, Inc. for an Order Preserving Local Exchange Market Stability*, Case Nos. PUC-2204-00073 & PUC 2204-00074, at 6 (Va. SCC July 19, 2004) (emphasis added).

[4] The following parties filed comments regarding the Department's Briefing Questions: the Attorney General ("AG"); AT&T Communications of New England, Inc. ("AT&T"); Conversent Communications of Massachusetts, LLC ("Conversent"); Covad Communications Company ("Covad"); MCI, Inc. ("MCI"); Sprint Communications Company, L.P. ("Sprint"); A.R.C. Networks (d/b/a InfoHighway Communications, Broadview Networks, Inc., Broadview NP Acquisition Corp., Cleartel Telecommunications, Inc., f/k/a Essex Acquisition Corp., DSCI Corporation, Metropolitan Telecommunications, Inc., XO Communications, Inc., and XO Massachusetts, Inc.) (hereinafter referred to as "A.R.C. Networks"). In addition, the following CLECs filed joint comments: ACN Communication Services, Inc.; Allegiance Telecom of Massachusetts, Inc.; Choice One Communications of Massachusetts, Inc.; CTC Communications Corp.; DSLnet Communications, LLC; Focal Communications Corporation of Massachusetts; Lightship of Telecom, LLC; McGraw Communications, Inc.; RCN-BecoCom, LLC; RCN Telecom Services of Massachusetts, Inc; segTEL, Inc.; and XO Massachusetts, Inc. (hereinafter jointly referred to as "Joint CLECs").

elements subject to the D.C. Circuit's order of vacatur, period. That simple point of law should guide the Department as it considers CLEC claims here and in other proceedings that seek – without any principled basis in law – to perpetuate their free-ride on Verizon MA's network.

REPLY COMMENTS ON BRIEFING QUESTIONS

Briefing Question 1

> When the vacatur takes effect, what are Verizon's obligations with respect to mass market switching, UNE-P, high capacity loops, and dedicated transport under applicable federal law, giving effect to any change of law provisions in carrier's interconnection agreement? What is the appropriate role for the Department, if any, under federal law when the vacatur takes effect?

Reply Comments on Briefing Question 1

The Department's briefing questions are based on the recognition that *USTA II* vacated Verizon MA's obligations to provide unbundled access to mass market switching, mass market UNE-P, high capacity loops and transport, and dark fiber. Accordingly, the only question is whether Verizon MA has any continuing federal obligation under its interconnection agreements to continue to provide access to such elements despite the elimination of the underlying statutory requirement. As Verizon MA explained in its July 30th Comments, most of Verizon MA's agreements explicitly provide that Verizon MA's unbundling obligations under its interconnection agreements are limited to the obligations imposed under applicable law, that is, valid FCC unbundling regulations adopted pursuant to 47 U.S.C. § 251(c)(3). And in cases where an amendment of existing agreements would clarify the scope of Verizon MA's obligations, Verizon MA has initiated a proceeding to effect such amendments

expeditiously.

In their responses to the Department's briefing question, the CLECs – principally AT&T – raise four general points. First, AT&T argues that *USTA II* is a legal nullity, with "no effect on Verizon's obligations." AT&T Response at 1. Second, various carriers – including Conversent, Sprint, and MCI – argue that *USTA II* did not vacate Verizon MA's obligation to provide unbundled access to high capacity loops. AT&T Response at 1-6; Conversent Response at 2-4; Sprint Response at 2-4; MCI Response at 1-3. Third, AT&T argues that the Department may adopt unbundling requirements under Section 251(c)(3) in the absence of valid federal regulations. AT&T Response at 14-20. Fourth, carriers argue that Verizon MA is required to provide access to elements subject to the D.C. Circuit's order of vacatur under existing interconnection agreements. AT&T Response at 4-7; ARC Response at 8-10; Joint CLECs Response at 7. None of these arguments has merit.[5]

First, the claim that *USTA II* has no effect on Verizon MA's unbundling obligations ignores the plain terms of the D.C. Circuit's order. That opinion vacated – eliminated – existing federal regulations requiring Verizon MA to unbundle mass market switching and high capacity facilities, including dark fiber. The mandate implementing that order of vacatur has issued. Nor can there be any dispute that the D.C. Circuit understood that its order would provide ILECs the comprehensive relief that they sought. In the litigation giving rise to *USTA II*, ILECs had sought an order of mandamus, requiring the FCC to adopt lawful unbundling regulations. The D.C. Circuit did not deny

[5] Covad also makes an argument that pursuant to Section 271, the Department can override the FCC's elimination of "line sharing" as a UNE and phasing out its availability. Covad Response at 4-8. As discussed below, Covad's claims are unfounded.

those petitions – instead it dismissed them "as moot." *USTA II*, 359 F.3d at 595. They were moot precisely because the court granted ILECs everything they had asked for and more - the court foreclosed the imposition of *any* obligation under Section 251(c)(3) to provide unbundled access to the elements subject to the order of vacatur in the absence of lawful unbundling rules adopted *by the FCC*.

For this reason, AT&T's suggestion that the ILECs' counsel in *USTA II* somehow "conceded" that the unusual remedy that the court granted in *USTA II* would be inadequate to grant relief is plainly wrong. AT&T Response at 2. Instead, the colloquy that AT&T reproduces, which of course took place *before USTA II* was decided, simply reflects the possibility that some existing interconnection agreements – and counsel for the ILECs was not discussing any specific agreement, let alone any Verizon MA agreement – might have terms that would allow CLECs to continue obtaining unbundled access to UNEs despite the vacatur of one or more of the FCC's unbundling rules. That has nothing to do with whether vacatur eliminates the obligation imposed by the regulation – obviously, it does – nor does it in any way suggest that any carrier is foreclosed from enforcing the terms of existing agreements where those agreements limit carriers' obligations to those imposed by federal law.[6]

Indeed, if there were any doubt about the sweeping effect of the court's order in *USTA II*, the CLECs' action in the wake of the order would resolve it. The CLECs have used every procedural avenue open to them in an attempt to delay the issuance of the *USTA II* mandate – they sought a stay from the D.C. Circuit and from the United States Supreme Court.

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[6] As proof of this, in response to the court's mandate, the FCC has reportedly adopted interim rules to re-establish some federal unbundling obligations. It has not yet, however, issued those rules.

In seeking such relief, the carriers – *including* AT&T – argued that issuance of the mandate would mean elimination of federal unbundling requirements.[7] Needless to say, the courts quickly rejected CLECs' bid to delay the enforcement of the D.C. Circuit's order. In short, AT&T's claim that *USTA II* has no effect is completely wrong. *USTA II* is the law of the land.

Second, the claim that the D.C. Circuit left unbundling rules in place for high capacity loops is incorrect. The D.C. Circuit left no doubt that its vacatur of rules requiring unbundling of "certain dedicated transport elements (DS1, DS3, and dark fiber)," *USTA II*, 359 F.3d at 594, applies to both high capacity loops and dedicated transport. That is clear first and foremost because the court explicitly said as much; it stated in no uncertain terms that "dedicated transport elements" referred to *all* high capacity "transmission facilities" – not just inter-office facilities dedicated to a "single . . . carrier" but also loops "dedicated to a single customer." *Id.* at 573. Likewise, when the court vacated the FCC's delegation scheme with respect to mass market switching, it noted that its holding "requires that we vacate the [FCC's] subdelegation scheme with respect to dedicated transport elements" – *i.e.*, both loops and transport, for which the FCC adopted a similar scheme.

Moreover, the D.C. Circuit's treatment of high-capacity loops and transport was consistent with the manner in which the ILECs briefed the issue before the D.C. Circuit, by addressing both simultaneously. And the two substantive flaws the D.C. Circuit identified with respect to the FCC's analysis of high-capacity facilities that independently

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[7] Thus, for example, AT&T and other CLECs argued that, in the absence of a stay, if no "*new rules*" are adopted "that *protect the status quo*," no existing rules would impose such an obligation. *See* Application of AT&T Corp., et al. for a Stay, *AT&T Corp. v. United States Telecom Ass'n*, No. 03-A1010, at 7 (U.S. filed June 10, 2004).

warranted vacatur of those rules — considering impairment on a route-specific basis and the failure to consider the availability of special access, *see USTA II*, 359 F.3d at 575, 577 — apply equally to the FCC's determinations as to both loops and transport. *See Triennial Review Order* at ¶¶ 2, 332, 341, 401, 407. The Department has therefore correctly stated in its briefing question that the order of vacatur applies to high-capacity loops.

Third, AT&T's claim that the Department has authority to perpetuate unbundling rules pursuant to Section 251(c)(3) (AT&T Response at 7-8) is flatly inconsistent with the 1996 Act and the D.C. Circuit's decision in *USTA II*. Section 251(d)(2) requires *the FCC* to "determine what network elements should be made available for purposes of subsection (c)(3)." 47 U.S.C. § 251(d). The D.C. Circuit has squarely held that this responsibility must be fulfilled by the FCC, not by someone else. Furthermore, as the D.C. Circuit held, the 1996 Act "carefully delineate[s] a particular role for the state commissions" (*USTA II*, 359 F.3d at 568), and that role does *not* include adoption of regulations interpreting the unbundling requirement of Section 251(c)(3). To the contrary, Section 252 establishes that, in arbitrating interconnection agreements, the Department is to *apply* the law, "including the regulations prescribed *by the [FCC]*," to establish rates in accordance with statutory standards, and to provide for a schedule of implementation. 47 U.S.C. § 252(c). The determination of *which* elements should be unbundled under the Act is within the exclusive province of the FCC.

For related reasons, AT&T's claim that the 1996 Act leaves the states free to adopt whatever unbundling regulations they please in the absence of federal unbundling regulations is plainly wrong. As Verizon MA has already explained, the Supreme Court

and the D.C. Circuit have made clear that the Act establishes as an affirmative requirement of federal law that there be a valid finding of impairment *before* an incumbent can be required to unbundle any network element. *See* Verizon MA Response at 12-13. In the absence of any such finding – and, again, this is a finding that only the FCC is empowered to make – imposition of any unbundling requirement is inconsistent with federal law and is not permitted.

The FCC made this clear in a portion of the *Triennial Review Order* that the D.C. Circuit left intact.[8] The Act authorizes "*the Commission*" to "*determin[e]* what network elements should be made available for purposes of" Section 251(c)(3). 47 U.S.C. § 251(d)(2) (emphases added). The FCC therefore ruled that in circumstances where "the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis," states are effectively barred from adopting any unbundling requirement because it would be "unlikely that such decision would fail to conflict with … implementation of the federal regime." *Triennial Review Order* at ¶ 195. The same reasoning applies in circumstances where a reviewing court has found that there is no valid FCC finding of impairment. In that situation, too, there is a binding federal judgment that unbundling cannot be ordered in a manner that is "rationally related

[8] AT&T ignores this portion of the *Triennial Review Order*, even though it challenged it before the D.C. Circuit and, therefore, cannot claim ignorance of it. Accordingly, its reliance on *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812 (5th Cir. 2000), *In re Petition of Verizon New England*, 795 A.2d 1196 (2002), and *Southern New England Telephone Co. v. Department of Public Utility Control*, 803 A.2d 879 (2002) is obviously misplaced. Those decisions – wrongly decided when issued – were reached prior to the *Triennial Review Order* and do not reflect the FCC's most recent interpretation of the statute, which resolves this issue against AT&T's argument. And, as Verizon MA noted in its opening comments, the clear majority of federal courts to have addressed this issue, even before the *Triennial Review Order*, clearly held that the 1996 Act preempts state commission attempts to impose unbundling obligations outside of the Section 252 process that Congress established. Verizon MA Response at 26-28; *see also Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441, 443 (7th Cir. 2003); *Pac Bell v. Pac-West Telecommunications, Inc.*, 325 F.3d 1114, 1126-27 (9th Cir. 2003); *Verizon North Inc. v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002). AT&T ignores these authorities.

to the goals of the Act." *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 388 (1999). To the contrary, unbundling in the absence of impairment undermines the Act's principal goal of promoting facilities-based competition. *United States Telecomm. Ass'n v. FCC*, 290 F.3d 419, 424-25 (8th Cir. 2002) ("*USTA I*").

The 1996 Act embodies the same principle – it preserves only those state regulatory requirements that are "*consistent* with" and "do[] *not* substantially prevent implementation of the requirements of this section [251]." 47 U.S.C. § 251(d)(3) (emphases added). State regulatory requirements that undermine a binding federal determination that particular elements should not be unbundled necessarily "substantially prevent implementation of the requirements of this section." It is merely common sense that, where the D.C. Circuit has vacated the FCC's adoption of a requirement to provide access to network elements at TELRIC rates as contrary to federal law, the states are not free to circumvent that ruling without running afoul of federal law.

In fact, the Department has already recognized the preemptive effect of federal law in this area. Shortly after the FCC issued the *Triennial Review Order*, the Department asked parties in D.T.E. 98-57 Phase III to address the impact of the order on its ongoing inquiry into unbundling of Packet Switching at Remote Terminals ("PARTS"). Specifically, the Department sought to determine whether it was preempted by the FCC's determination that ILECs were not impaired without unbundled access to packet switching. The Department concluded that it was and terminated its investigation. The Department ruled that:

> State mandated unbundling under Massachusetts law would not be "merely" inconsistent with the federal rules in their current form, but would be contrary to them. … Therefore, …. we conclude that the FCC's *Triennial Review Order*

> precludes further Department review of Verizon PARTs unbundled packet switching offering.

D.T.E. 98-57, *Phase III-D Order* at 15, 16-17 (2004).[9] The Department's reasoning is equally applicable to the other network elements that the FCC has "delisted" and those for which there are no currently effective FCC rules.

AT&T ignores the Department ruling in D.T.E. 98-57 Phase III-D and points to a single decision of the Maine Public Utilities Commission in support of its arguments.[10] AT&T Response at 13. But while it is perhaps not surprising that a state commission would wrongly claim such authority, it is far more notable that both the Department and other state commissions have correctly recognized that they have *no* authority to order unbundling where the FCC has acted or in the absence of valid FCC regulations. As noted above, that was the square holding of the Virginia State Corporation Commission. *See supra* note 3. And it was likewise the holding of the Oregon Commission, which held that there must be a lawful, "affirmative finding of impairment *before* an incumbent telecommunications carrier can be *required* to provide a UNE" – a finding that only the FCC is empowered to make under the statute.[11] In sum, in the absence of valid

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[9] The Department also rejected CLEC claims that the Department should continue its investigation under Section 271 of the 1996 Act. Here too, the Department rejected the CLECs' argument and ruled:

> … if Verizon is obligated to offer access to packet switching under Section 271 at "just and reasonable" rates under Sections 201 and 202, the FCC, not the Department, has authority to enforce that obligation under Section 271. 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. *Id.*

D.T.E. 98-57, *Phase III-D Order* at 16.

[10] It should be noted that Verizon has appealed the Maine Commission's decision on the grounds that it has no authority under state law to require unbundling, but even if it does, it is preempted by federal law.

[11] Order, *Verizon Northwest Inc. Petition for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers and Commercial Mobile Radio Service*

unbundling rules adopted by the FCC pursuant to Section 251(c)(3), federal law bars the imposition of any requirement that Verizon MA provide unbundled access to its network at TELRIC rates.

Fourth, as virtually every state commission to consider the issue has held, there can be no doubt that in those cases where Verizon MA's interconnection agreement requires Verizon MA to provide access to unbundled network elements only as required by applicable law, the vacatur of unbundling requirements in *USTA II* eliminates any obligation for Verizon MA to provide access to those elements. Verizon MA does not intend to seek any amendment of those agreements. *See* Verizon MA Response at 11 n.14. By contrast, in those cases where Verizon MA intends to seek an amendment to reflect current law, the Department should carry out its responsibility to enforce the law as expeditiously as possible.

Notably, while several carriers argue that their current agreements require amendment before Verizon MA can discontinue provision of de-listed UNEs at TELRIC rates, most do not, and the carriers cannot cite any language that would support this result. Verizon MA emphasizes that the Department should not construe any agreement now because, at this point, there are only hypothetical disagreements that might (but might not) ripen into actual disputes. It is possible that there will be no dispute with respect to many, if not all, of carriers — either because they will agree as to the interpretation of existing agreements, or because future legal rulings by the FCC or the courts may moot any disagreements. Because no actual dispute has been presented to the

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Providers in Oregon Pursuant to Section 252 of the Communications Act of 1934, as Amended, and the Triennial Review Order, ARB 531, at 8 (Ore. PUC June 30, 2004) (emphases added).

Department, it would be premature for the Department to rule on the meaning of each of the interconnection agreements at issue at this time.[12]

In addition, virtually all, if not all, of the interconnection agreements specify processes that must be followed in the event that one party disagrees with the other's interpretation of the agreement. Those processes, which are conditions precedent under the agreements, at a minimum, include a period of negotiations before any complaints are presented to the Department or another adjudicator with jurisdiction to rule on the parties' dispute. If and when these procedural preconditions are met, if a CLEC disagrees with Verizon MA's implementation of an agreement, it may be permitted under the terms of the agreement to bring a complaint to the Department or other appropriate decision-maker for resolution.

But even a quick survey of some of Verizon MA's agreements leaves no room for dispute that most do, in fact, limit Verizon MA's unbundling obligations to those imposed under current federal law. For example, Verizon MA's interconnection agreements with several carriers[13] provide:

> **Notwithstanding anything in this Agreement to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law, Verizon is not required by Applicable Law to provide any Service,** payment or benefit, otherwise required to be provided to [CLEC] hereunder, then **Verizon**

[12] Indeed, this case does not involve the interpretation of any interconnection agreement, but was opened by the Department solely "to implement the requirements of the Federal Communications Commission's Triennial Review Order." D.T.E. 03-60, *Vote and Order to Open Proceeding* at 4. Since the FCC's sub-delegation to state commissions to conduct unbundling analyses was declared unlawful in *USTA II*, there is, in fact, nothing left for the Department to do in this case.

[13] The carriers with identical or substantially identical language include AccessPlus Communications, Inc.; ACN Communications Services, Inc.; DSCI Corp.; DSLnet Communications, LLC; MCI WorldCom Communications, Inc. (as successor to Rhythms Links Inc.); and Metro Teleconnect Companies, Inc.

> **may discontinue the provision of any such Service**, payment or benefit . . . . Verizon will provide thirty (30) days prior written notice to [CLEC] of any such discontinuance of a Service, unless a different notice period or different conditions are specified . . . .

General Terms & Conditions § 4.7 (emphases added). Applicable Law is defined in these agreements as "[a]ll effective laws, government regulations and orders, *applicable to each Party's performance of its obligations under this agreement*." Glossary § 2.10. With respect to the obligation to provide UNEs, "Applicable Law" is therefore limited to the requirements that state commissions are authorized to enforce under Section 252 of the 1996 Act – that is, unbundling requirements validly imposed under FCC rules adopted pursuant to Section 251(c)(3).

Moreover, with respect to UNEs in particular, these agreements provide:

> Without limiting Verizon's rights pursuant to Applicable Law or any other section of this Agreement to terminate its provision of a UNE or a Combination, **if Verizon provides a UNE or Combination to [CLEC], and the Commission, the FCC, a court or other governmental body of appropriate jurisdiction determines or has determined that Verizon is not required by Applicable Law to provide such UNEs or Combination, Verizon may terminate its provision of such UNE or Combination to [CLEC]** . . . .

UNE Attachment § 1.5 (emphasis added). Like § 4.7, nothing in § 1.5 states — or even suggests — that Verizon MA must amend its agreement before it terminates its provision of those UNEs.

Interconnection agreements with another group of carriers[14] contain similarly clear language:

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[14] These carriers include Broadview Networks, Inc.; Broadview NP Acquisition Corp.; Lightship Telecom LLC, and McGraw Communications Inc. The agreement with Essex Acquisition Corp. contains similar language.

> To the extent required by Applicable Law, and subject to the provisions of this Section 11.0 (including, without limitation, Section 11.7 hereof), BA shall offer to [CLEC] nondiscriminatory access to Network Elements on an unbundled basis at any technically feasible point pursuant to, and in accordance with the terms and provisions of, this Agreement; provided, however, that **BA shall not have any obligation to continue to provide such access with respect to any Network Element listed in Section 11.1 (or otherwise) that ceases to be subject to an unbundling obligation under Applicable Law** . . . . Unless otherwise agreed to by the Parties (or required by Applicable Law), **the transition period shall be at most three (3) months from the date that the FCC (or other applicable governmental entity of competent jurisdiction) issues (or issued) public notice that BA is not required to provision a particular Network Element.** . . .

General Terms & Conditions § 11.0 (emphases added). This provision, at the start of the series of provisions addressing Verizon MA's obligation to provide the CLEC with UNEs under the terms of the agreement, states that Verizon MA "shall not have *any* obligation" to "continue" to provide access to those UNEs "that cease[] to be subject to an unbundling obligation under Applicable Law." This provision, therefore, expressly limits Verizon MA's obligation to provide UNEs under the agreement and directly ties Verizon MA's obligations to the requirements of Applicable Law, which is defined as "all laws, regulations and orders applicable to each Party's performance of its obligations hereunder." Agreement § 1.6.

As explained above, in the context of Verizon MA's obligation to provide UNEs, "Applicable Law" is therefore limited to the requirements imposed by federal law. Therefore, where federal law no longer requires Verizon MA to provide UNEs, Section 11.0 provides that Verizon MA "shall not have any obligation to continue" to do so.

The Agreement further provides:

> Except as explicitly provided in Sections 4.2.4, 5.7 and 22 of this Agreement, **notwithstanding anything else herein to the contrary, if, as a result of any decision, order or determination of any judicial or regulatory authority with jurisdiction over the subject matter hereof, it is determined that BA is not required to furnish any service, facility or arrangement**, or to provide any benefit required to be furnished or provided to [CLEC] hereunder, **then BA may discontinue the provision of any such service, facility, arrangement** or benefit to the extent permitted by any such decision, order or determination **by providing ninety (90) days prior written notice to [CLEC]**, unless a different notice period or different conditions are specified in this Agreement (including, but not limited to, in an applicable Tariff or Applicable Law) for termination of such service, in which event such specified period and/or conditions shall apply.

Id. § 27.4 (emphases added). This section applies, with a few limited exceptions (none of which is relevant here), "notwithstanding *anything else*" in the agreement that is "to the contrary" and could be construed to require Verizon MA to continue providing access to a UNE.

Verizon MA has a number of widely-adopted agreements that contain comparably clear language.[15] Again, the point of this discussion is not to call upon the Department to rule upon the proper interpretation of any of them. Instead, the point is simply that where Verizon MA's unbundling obligations are limited to those validly imposed under applicable law, those agreements must be enforced as written.

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[15] These include agreements with Choice One Communications of Massachusetts, Inc.; Covad Communications Company; CTC Communications Corp.; Focal Communications Corp. of Massachusetts, and Sprint Communications Company, L.P. Although AT&T claims that the language of the interconnection agreement between Verizon and A.C.C. National Telecom Corp. requires amendment, AT&T is wrong: that agreement authorizes Verizon MA to cease providing access to network elements pursuant to a court finding, so long as A.C.C. has a "reasonable time" to prepare for the change. *See* Verizon-ACC Agreement § 35.0.

Briefing Question 2(a)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> a) What are Verizon's obligations to provide such UNEs under Massachusetts law?

Reply Comments on Briefing Question 2(a)

Several parties assert that Chapter 159 of Massachusetts General Laws affords the Department broad supervisory authority over Verizon MA's network and services, thereby enabling the Department to exercise control over the unbundling of Verizon MA's network facilities. AT&T Response at 14-20; Conversent Response at 5-6; Joint CLECs Response at 3; ARC Response at 21-22. They assert that the Department may exercise this state-law authority in the absence of FCC rules mandating unbundling of particular elements or to over-ride an FCC determination of no impairment to require unbundling as a matter of state law. *Id*. Their claims are plainly without merit.

First, as discussed above, while the 1996 Act does afford states *some* role in implementing the Act — such as reviewing and approving interconnection agreements pursuant to 47 U.S.C. Section 252 — it vests the authority to make unbundling determinations, including the determination as to whether competitive local exchange carriers would be "impaired" without access to incumbent-provided network elements on an unbundled basis, exclusively with the FCC. 47 U.S.C. § 252(d)(2); *see USTA II*, 359 F.3d at 565-58. In its *Triennial Review Order*, the FCC has itself made clear that states are *not* free to reconsider federal policies and impose an unbundling requirement that the FCC has already considered and expressly rejected.[16] A state initiative to reinstate a UNE

[16] The FCC cautioned:

that the FCC has expressly removed would be inconsistent with, and substantially prevent the implementation of, the federal unbundling scheme.

Moreover, as the *USTA II* court made clear, the Act establishes as an affirmative requirement of federal law that there be a valid finding of impairment by the FCC *before* an incumbent can be required to unbundle any network element. Where no such valid finding exists, imposition of any unbundling requirement is inconsistent with federal law and is not permitted. Thus, the Department cannot act in a manner that would interfere with the FCC's exclusive jurisdiction to establish UNEs under federal law.

As stated by the U.S. Supreme Court, "[n]ot the federal but the state regulation must be subordinated, when Congress has so plainly occupied the regulatory field." *Northern Natural Gas Co. v. State Corporation Commn.*, 372 U.S. 84, 93 (1963). Thus, even if the Department had the power to impose unbundling requirements under state law – which it does not – requiring Verizon MA to do so would frustrate the objectives of the federal unbundling regime under the 1996 Act and is, therefore, preempted. As discussed above, the Department has already recognized the preemptive effect of federal law and declined CLEC invitations to consider unbundling where federal law does not require it. D.T.E. 98-57, *Phase III-D Order* at 15-17.

Second, assuming *arguendo* that preemption is not an issue, the Department has no independent state authority to mandate that Verizon MA turn over elements of its

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> If a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment – and thus has found that unbundling that element would conflict with the limits [on unbundling] found in section 251(d)(2) – or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and "substantially prevent" implementation of the federal regime, in violation of section 251(d)(3)(C).

Triennial Review Order, at ¶195.

network to its competitors. The Department derives its jurisdiction for regulation of intrastate telecommunications carriers within Massachusetts from the Legislature under Chapter 159 of Massachusetts General Laws. That statute provides the Department with broad general supervisory power over the provision of telecommunications services, as well as specific authority to investigate and rule on the rates, prices and charges for such services. However, nowhere in that statute has the Legislature delegated either express or implied state authority to the Department to appropriate Verizon MA's private property by mandating the unbundling of Verizon MA's network facilities for the use of its competitors.

Pursuant to Chapter 159, Section 12, the Massachusetts Legislature has empowered the Department with

> … general supervision and regulation of, and jurisdiction and control over, the following services, when furnished or rendered for public use within the commonwealth …
>
> (d) The transmission of intelligence within the commonwealth by electricity, by means of telephone lines or telegraph lines or any other system of communication, including the operation of all conveniences, appliances, instrumentalities, or equipment appertaining thereto, or utilized in connection therewith.

Mass. General Laws c. 159, § 12. The Department "may inquire into the rates, charges, regulations, practices, equipment and services of common carriers in this commonwealth, rendering any service of a kind subject to its jurisdiction." Mass. Gen. Laws c. 159, § 13. Sections 14, 17 and 20 of Chapter 159 further describe the Department's authority over common carrier rates subject to its jurisdiction.[17]

[17] Section 14 states, in pertinent part, that:

There is *no explicit* grant in the statues authorizing the Department to compel Verizon MA to unbundle its network. The actual express delegations of power center primarily on the Department's control over utility (*i.e.*, telecommunications) services – not the private property rights to a utility's facilities and assets. Network unbundling is not, however, a "service" that Verizon MA offers to competitors, and Verizon MA does not provision any communications "service" over an unbundled network element. Rather, unbundling is an extraordinary appropriation of Verizon MA's property rights, which requires Verizon MA to turn over control and operation of pieces of its network to its competitors so that they can provide telecommunications services.

Likewise, the Department has no independent state authority to require the unbundling of network facilities pursuant to its *implied* power under Chapter 159. Massachusetts courts have typically given special scrutiny to assertions of *implied* authority. *See e.g., Grocery Manufacturers of America, Inc. v. Department of Public Health*, 379 Mass. 70, 75-77, 393 N.E.2d 881 (1979). In particular, the Massachusetts

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> Whenever the department shall be of the opinion, after a hearing had upon its own motion or upon complaint, that any of the rates, fares or charges of any common carrier for any service to be performed within the commonwealth, or the regulations or practices of such common carrier affecting such rates, are unjust, unreasonable, unjustly discriminatory, unduly preferential, in any wise [*sic*] in violation of any provision of law, or insufficient to yield reasonable compensation for the service rendered, the department shall determine the just and reasonable rates, fares and charges to be charged for the service to be performed …

Mass. General Laws c. 159, § 14. Likewise, Section 20 states, in pertinent part, that:

> If [as regards] … any proposed decrease in any rate … it shall appear to the department that the said rate, joint rate, fare, telephone rental, toll or charge is insufficient to yield reasonable compensation for the service rendered, the department may determine what will be a just and reasonable minimum to be charged …

Mass. General Laws c. 159, § 20; *see also* Mass. Gen. Laws c. 159, § 17 ("All charges made … by any common carrier for any service rendered … shall be just and reasonable … and every unjust or unreasonable charge is hereby prohibited and declared unlawful").

Supreme Judicial Court has held that "[w]hen we have found an implied authority to issue regulations … there has always been at least a rational relationship between the regulation and the purpose of the statute that we viewed as authorizing the regulation." *Life Insurance Assn. of Mass. v. Commissioner of Insurance*, 403 Mass. 410, 417, 530 N.E.2d 168 (1988). Indeed, the Court found that "[a]n implication of authority cannot arise from a statutory vacuum." *Id*. at 418.

For example, in *Massachusetts Electric Company v. Department of Public Utilities*, 419 Mass. 239, 643 N.E.2d 1029 (1994), the Court held that the Department acted in excess of its statutory authority by requiring "electric utilities to select new [power] resources based on environmental externality values that encompass costs that Massachusetts ratepayers would otherwise not incur." 419 Mass. at 241. The Court concluded that the Department

> does not have responsibility for the protection of the environment. It has regulatory authority over an electric utility's rates, and reasonable costs to be incurred in protecting the environment, whether mandated or voluntary, may be reflected in a utility's approved rates.

Id. at 246. The Court added that while "these are important subjects, … they lie in the jurisdiction of legislatures and those environmental (and rate) regulators to whom legislators have delegated authority to act. The department does not now have delegated authority to consider the over-all impact of pollution on society in carrying out its regulatory functions." *Id*. at 247.

Similarly, the Court held in *City of Newton v. Department of Public Utilities*, 367 Mass. 667, 328 N.E.2d 885 (1975), that "the statutory grant of authority to the Department to regulate and supervise the Company's activities does not imply the power to impose a broad system of rate rebates for inadequate service." *Id*. at 679. The Court

noted that where the state legislature has "desired that the Department have the power to order any form of rebates, it has expressed that intent by statutory enactment. *Id*. at 679-80. Thus, the absence of any explicit reference to such authority constitutes "an intentional limitation of the Department's power" in that regard. *Id*. at 679, citing *Metropolitan District Commission v. Department of Public Utilities*, 352 Mass. 18, 26 (1967).

The Department's *implied* power to reach beyond its express jurisdiction over services and alter Verizon MA's property rights to ownership and control of its own facilities by mandating unbundling cannot lightly be presumed. This is particularly true because the Legislature, in striking contrast, has acted in deliberate fashion in connection with electric industry restructuring to grant *expressly* the Department the power to also regulate utility property rights. *See* 1997 Amendment, Sec. 1, Mass. Gen. Laws c. 25, § 4; *see also* Mass. Gen. Laws c. 164, § 1A; 220 C.M.R. 11.00 et al. By enacting a comprehensive delegation of power to the Department to restructure the generation, transmission and delivery of electric energy, including the express power to require electric companies to divest generation assets and compel a competitive market structure for generation services, the Legislature proves that where it intends to provide the Department with the authority to override utility property rights, it delegates that power to the Department deliberately and expressly.

By contrast, in telecommunications, the Department lacks any express delegation comparable to the detailed statutory provisions required for the restructuring of electric utilities. This belies the parties' assertion that the Department's unbundling power is implicit to its statutory mandate. Where the Legislature has directly considered the

power to regulate utility private property (as evident with electric utilities) and declined to extend such extraordinary power to telecommunications, such implied powers are denied to the Department. Accordingly, any attempt by the Department - in the absence of an express statutory mandate - to impose unbundling requirements eliminated by either the *Triennial Review Order* or *USTA II* would exceed the Department's regulatory authority – express or implied - under Massachusetts law.

Finally, notwithstanding the fact that the Department has no state-law authority to require Verizon MA to provide unbundled elements to its competitors, there is *no* standard upon which to make unbundling determinations solely under state law. Indeed, the Department has consistently applied federal law in setting Verizon MA's unbundling obligations. *See e.g.*, D.T.E. 03-59, *Order*, at 7-8 (January 23, 2004). Contrary to CLECs' suggestions, the Department cannot simply declare that a state unbundling regime exists. Before embarking on a state unbundling regime, the Department would have to address through an adjudication a myriad of factual and legal issues.

For example, if unbundling were permissible under state law – which it is not – the Department would first have to determine proper constitutional safeguards, standards and conditions applicable to unbundling. Both the 1996 Act and the statutory delegation regarding electric industry restructuring in Massachusetts set out extensive, comprehensive provisions governing the property rights of public utilities in their own assets. No comparable standards exist – either express or implied – for the unbundling of a telecommunications carrier's assets under Massachusetts law.

In addition, the Department's unbundling power would need to extend to all telecommunications carriers in Massachusetts, including all incumbents, *i.e.*, Verizon

MA and independent telephone companies ("ITC"), CLECs, and interexchange carriers ("IXC"). Unlike the federal unbundling scheme, which is limited to ILECs (not exempted by 47 U.S.C. § 251(f)), Chapter 159 does not apply solely to Verizon MA, but to all carriers. This was explicitly recognized by the Department in its decisions[18] in D.T.E. 01-31. D.T.E. 01-31, *Phase II Order*, at 71-72 (April 11, 2003). Moreover, applying the unbundling obligation solely to Verizon MA and not Verizon MA's local and toll competitors would violate equal protection. Thus, if the Department asserts that it has implied power under state law to require the unbundling of Verizon MA's network, then the Department must apply that same unbundling power to other carriers.[19]

Briefing Question 2(b)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (b) Do Verizon's obligations as carrier of last resort require it to offer UNEs? See Intra-LATA Competition, D.P.U. 1731, at 76 (1985).

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[18] In D.T.E. 01-31 (*Re. Verizon's Alternative Regulatory Plan*), the Department recognized that Chapter 159 of Massachusetts General Laws

> … does not differentiate between dominant and non-dominant carriers, CLECS and ILECs and interexchange carriers, etc. Our obligations under chapter 159 apply equally to every common carrier. Therefore, any argument to the effect that we are legally required to take certain measures in regulating Verizon, but not in regulating all other common carriers, is incorrect.

D.T.E. 01-31, *Phase II Order*, at 71-72 (April 11, 2003). Therefore, if the Department were to have the authority to compel Verizon MA to turn over operation and control of a portion of its network assets to its competitors, as some parties suggest, then such measures should apply equally to all telecommunications companies.

[19] Under those circumstances, Verizon MA arguably may seek to unbundle the network facilities of any carrier in the state – CLECs, IXCs and ITCs.

Reply Comments on Briefing Question 2(b)

AT&T argues that the Department has the authority under D.T.E. 1731 (*Re. IntraLATA Competition*) to require the unbundling of Verizon MA's network to promote competition in furtherance of its public policy goals. AT&T Response at 16-20. AT&T is obviously grasping at straws here. There is nothing in that case – decided in 1985 before the notion of network element unbundling was conceived – that even remotely can be construed as authorizing the adoption of a state unbundling regime.

However, even if the decision could be interpreted as broadly as AT&T argues, the Department could not act beyond its statutory authorization which, as discussed above, does not give the Department the power to mandate that Verizon MA turn over pieces of its network to its competitors.

Likewise, AT&T's argument that Verizon MA is obligated as "carrier of last resort" to unbundle its network for competitors goes far beyond the intent of that designation. As specifically stated in D.T.E. 1731, the Department found that Verizon MA's "carrier of last resort" obligations applied to the provision of retail services (*i.e.*, local exchange service and intraLATA toll, WATS and private line), and there is no basis for expanding this to wholesale services. *See* D.T.E. 1731, *Order*, at 76; *see also* Verizon MA Response at 15.

Briefing Question 2(c)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (c) Do the terms of Verizon's Alternative Regulation Plan indirectly require it to continue providing mass market switching, UNE-P, dedicated transport, and high-capacity loops at TELRIC rates, and if so, what would be the

consequences should Verizon discontinue providing any of the above TELRIC-based rates?

Reply Comments on Briefing Question 2(c)

AT&T suggests that the "quid pro quo" for the Department's adoption of Verizon MA's Alternative Regulation Plan (the "Plan") in D.T.E. 01-31 is Verizon MA's commitment to continue providing UNEs. AT&T Response at 22. There is no such requirement.

Nothing in Verizon MA's Plan mandates the company's continued provision of mass market switching, UNE-P, dedicated transport, or high-capacity loops at TELRIC rates regardless of any change in federal law. Likewise, the Department's orders did not condition upward pricing flexibility for retail business services on a commitment by Verizon MA to continue providing specific UNEs. Although the Department recognized that the availability of UNE-P contributed to the competitiveness of the business market, this was only one of several factors considered by the Department in assessing the appropriate regulatory framework for Verizon MA in the retail business market and was not a pre-requisite for approving the Plan. In fact, the Department determined in D.T.E. 01-31 that the market prices that are subject to the "disciplining effects of competitive forces" produce rates that are just and reasonable. D.T.E. 01-31, *Phase I Order*, at 19 (May 8, 2002).

The fact that certain UNEs have been eliminated because the impairment standard under the Act has not been satisfied confirms the Department's decision to grant Verizon MA upward pricing flexibility for retail business services. Where there is no impairment for network facilities – hence no obligation to unbundle under Section 251 – there are no operational or economic barriers to CLECs entering the market. The result will be true

competition and greater consumer benefits, which are the goals of the Plan as well. Accordingly, there is no conflict between the Plan and Verizon MA's elimination of certain UNEs, as AT&T erroneously suggests.

Briefing Question 2(d)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (d) If carriers reach agreement on terms for mass market circuit switching, may or must those agreements be filed with the Department as interconnection agreements for approval under 47 U.S.C. § 252? May or must those agreements be filed with the Department for approval as customer specific arrangements? See AT&T Communications of New England, Inc., D.P.U. 90-24 (1990). Would such terms be subject to the federal pick and choose rule? 47 U.S.C. § 252(i).

Reply Comments on Briefing Question 2(d):

Verizon MA has explained that there is no requirement for filing of any commercial agreements relating to provision of mass market switching services pursuant to Section 252. The CLECs, however, claim that Section 271(c)(1)(A), which refers to "agreements that have been approved under section 252," requires former Bell Operating Companies ("BOC") to offer Section 271 elements in interconnection agreements subject to the review process established in Section 252. But Section 271(c)(1)(A) says nothing of the sort.[20] That section, however, expressly refers only to "approv[al]" of agreements under Section 252.

[20] Nor does section 271(c)(2), which merely cross-references section 271(c)(1)(A). *See* 47 U.S.C. § 271(c)(2) (referring to a BOC "providing access . . . pursuant to one or more agreements described in [section 271(c)](1)(A)," where "such access . . . meets the requirements of" the competitive checklist).

Congress made no mention of including Section 271 elements in negotiations under Sections 251(c)(1) and 252(a)(1), arbitrations under Section 252(b), state commission resolution of open issues under Section 252(c), or state commission rate-setting under Section 252(d)(1). All of those sections, instead, are explicitly linked — and limited — to the implementation of Section 251(b) and (c). The bare reference to agreements "approved under section 252" in Section 271(c)(1)(A) is insufficient to vitiate the express terms Section 252, particularly given that Congress "carefully delineate[d] [the] particular role for the state commissions" under the 1996 Act. *USTA II*, 359 F.3d at 568; *see AT&T v. Iowa Utilities Board*, 525 U.S. at 385 n.10. If Congress had intended for state commissions to arbitrate terms and conditions implementing Section 271 as well as Section 251(b) and (c) it would have said so. Instead, "Congress[] grant[ed] . . . sole authority to the [FCC] to administer . . . section 271" and it "would be inconsistent" with that grant "to interpret the 1996 Act as allowing any other entity the authority to" implement section 271.[21]

In addition, the FCC has held that an agreement that does not "contain an ongoing obligation relating to section 251(b) or (c)" — such as an agreement limited to 271 elements — is *not* "an interconnection agreement that must be filed pursuant to section 252(a)(1)" and is *not* subject to "state commission . . . approv[al] or reject[ion] [of] the agreement as an interconnection agreement under section 252(e)." *Qwest Declaratory Ruling* ¶¶ 8, 12 & n.26.[22] The FCC also has not interpreted Section 271 to require a BOC

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[21] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, at ¶ 17 (1999) ("*InterLATA Boundary Order*").

[22] *In the Matter of Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, WC Docket No. 02-8917, 17 FCC Rcd 19337, at ¶¶ 8, 12 & n.26 ("*Qwest*

to provide every checklist item through a state-commission-approved interconnection agreement. Instead, the FCC has found that a BOC satisfies the competitive checklist as long as it has a "concrete and specific legal obligation" to provide a checklist item, such as through a tariff.[23]

A commercial agreement with a competitor unquestionably satisfies that standard. Such an agreement, moreover, if filed with the FCC, would be filed pursuant to Section 211(a), which provides for "fil[ing] with the Commission copies of all contracts . . . with other carriers" but not for prior Commission approval of such contracts. Accordingly, nothing in Section 271 requires Verizon MA to include 271 elements in interconnection agreements filed with the Department under Section 252(a)(1) or authorizes the Department to regulate the commercial agreements pursuant to which Verizon MA provides 271 elements.[24]

Declaratory Ruling"). CLECs argue that the *Qwest Declaratory Ruling* held that an agreement limited to 271 elements is an interconnection agreement for purposes of Section 252 ignore that the FCC specifically referred to "section 251(b) or (c)" but not to section 271 and to "unbundled network elements" — a term that appears only in section 251 and never in section 271. *Id*. at¶ 8 & n.26.

Also, because agreements limited to Section 271 elements are not interconnection agreements under Section 252, the opt in provision of Section 252(i) does not apply to such agreements. Instead, only the nondiscrimination standard in Sections 201 and 202 applies, and that standard is administered by the FCC.

23 Memorandum Opinion and Order, *Application of Verizon New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, 16 FCC Rcd 14147, at ¶ 39 (2001) ("*Connecticut 271 Order*"); *see e.g., Application of Verizon Pennsylvania Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, 16 FCC Rcd 17419, at ¶ 6 ((2001) "*Pennsylvania 271 Order*"); *Application of Verizon New England Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, 16 FCC Rcd 8988, at ¶ 194 (2001) ("*Massachusetts 271 Order*"); *Application of Bell Atlantic-New York Inc., et al., for Authorization to Provide In-Region, InterLATA Services in New York*, 15 FCC Rcd 5413, at ¶ 73 (2000) ("*New York 271 Order*").

24 The CLECs also contend that BOCs must negotiate terms for the provision of 271 elements as part of the Section 252 process for creating interconnection agreements. This claim also relies on the erroneous premise that Section 271(c)(1)(A) nullifies the express provisions of Sections 251(c) and 252 that tie the negotiation and arbitration process to implementation of Sections 251(b) and

Briefing Question 2(e)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (e) Should the Department establish a transition plan to replace TELRIC-based rates for mass market circuit switching, UNE-P, high capacity loops, and dedicated transport with just and reasonable market-based rates, as has been proposed in other states, such as New York, and if so, what should be the parameters of such a plan? See, e.g., In the Matter of Telecommunications Competition in New York Post USTA II Including Commitments Made in Case 97-C-0271, N.Y.P.S.C. Case 04-C-0420. What authority would the Department have to do so?

Reply Comments on Briefing Question 2(e)

Verizon MA and the commenters are generally in agreement that no Department transition plan is required. Moreover, as discussed in Verizon MA's July 30th Comments, the Department has no authority to establish a plan of transition away from TELRIC-based rates for mass market circuit switching, UNE-P, high capacity loops, and dedicated transport.

Briefing Question 2(f)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (f) Should the Department proceed with a separate hot cuts investigation under state law? If so, may the record already compiled in D.T.E. 03-60 be incorporated into such a proceeding? Would the scope of such an investigation and

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(c). Sections 251(c)(1) and 252(a)(1) do not obligate incumbents to negotiate terms for 271 elements *at all*, let alone as part of the negotiation of terms and conditions to implement the requirements of Sections 251(b) and (c). Nor does Section 252(c), which governs the Department's resolution of disputes in interconnection agreement arbitrations, establish standards for the Department to apply in addressing disputes unrelated to Section 251(b) and (c). There is no basis to conclude that Congress delegated federal authority to state commissions to decide non-Section 251 issues without providing any guidance as to the standard state commissions should apply in resolving those issues.

standard of review of proposed hot cut processes be different from the investigation in D.T.E. 03-60?

Reply Comments on Briefing Question 2(f)

Numerous CLECs argue that the Department should proceed with an investigation of Verizon MA's hot cut process. As Verizon MA has explained, the Department has no authority to conduct such a proceeding pursuant to the delegation of authority in the *Triennial Review Order* because the D.C. Circuit vacated all such delegations.[25] *See USTA II*, 359 F.3d at 564-65.

Nor, as Verizon MA has explained, is there any reason for the Department to conduct such a proceeding at this time. Verizon will soon begin to offer a batch hot cut process to CLECs throughout the Verizon footprint, including Massachusetts. The New York Public Service Commission ("PSC") currently has an on-going proceeding — beginning before and independently of the *Triennial Review Order* — related to that process and an order is expected soon. Rather than duplicate the New York PSC's work, Verizon MA submits that the more efficient use of the Department's resources would be to allow the development of a uniform batch hot cut process throughout the Verizon states, building from the decisions made in the New York batch hot cut proceeding. The Department can then address any discrete, Massachusetts-specific issues that might arise. None of the CLECs has offered any reason why the Department needs to replicate a proceeding that the New York PSC has nearly completed.

[25] With regard to the Attorney General's suggestion that the Department track affected UNE-P customers as they are transitioned by CLECs to other arrangements, Verizon MA states that it does not have information relating to the number of CLEC customers and access lines by CLEC that will be affected by the TRO revisions. AG Response at 3. Therefore, to the extent such information may be required, it would be available from the individual CLECs, not Verizon MA.

Briefing Question 2(g)

> In the absence of effective federal unbundling regulations under Section 251 applicable to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport:
>
> (g) What are Verizon's obligations pursuant to its wholesale tariff?

Reply Comments on Briefing Question 2(g)

As Verizon MA indicated in its July 30th comments, the company intends to update its current interconnection tariff to conform to the *USTA II* decision and the FCC's *Triennial Review Order*. That tariff will be revised to reflect federal law, and the Department is *not* at liberty to impose any different or additional requirements on Verizon MA under the guise of a tariff.

Although Verizon MA intends to revise its current interconnection tariff, courts have found that ILECs cannot be required to file and maintain a state interconnection tariff on an ongoing basis. *See* Verizon MA Response at 26-28; *see also Wisconsin Bell, Inc. v. Bie, Inc. et al*, 340 F.3d 441, 444 (7th Cir. 2003); *Verizon North, Inc. v. Strand*, 309 F.3d 935, 941 (6th Cir. 2002). The courts found that a tariffing requirement would interfere with the procedures established by the 1996 Act by "plac[ing] a thumb on the negotiating scales," and "[a]t the very least, … complicates the contractual route by authorizing a parallel proceeding." *Wisconsin Bell*, 340 F.3d at 444.

Moreover, contrary to AT&T's and other parties' claims, Verizon MA is not required under Massachusetts law to file such tariffs. The 1996 Act established a detailed regulatory framework whereby the ILECs would enter into interconnection agreements with competing carriers. The Section 251 elements covered by those agreements are governed by the Act and subject to FCC authority. It is redundant to file state tariffs - and, contrary to AT&T's allegation, it is unnecessary to ensure compliance with non-

discrimination statutes. AT&T Response at 40-41. If allowed, this would undermine the "degree of protection" afforded the negotiation procedure established by Act and indeed may circumvent the process by enabling state commissions to rule on interconnection tariff terms and conditions that are embodied in negotiated interconnection agreements. Accordingly, any state requirement that Verizon MA file or maintain an interconnection tariff would be inconsistent with federal law.

Briefing Question 3

> What steps, if any, should the Department take to encourage carriers to enter voluntarily into agreements with respect to mass market circuit switching, UNE-P, high capacity loops, and dedicated transport that promote efficiency, fairness, rate continuity, and earnings stability for all parties?

Reply Comments on Briefing Question 3

Numerous CLECs suggest that the Department could facilitate negotiations by issuing an order requiring Verizon MA to continue to providing mass-market switching, high-capacity loops and transport, and dark fiber as UNEs irrespective of the fact that the FCC's unbundling rules for those elements were vacated. AT&T Response at 42-44; ARC Response at 19-21; Joint CLECs Response at 2. As an initial matter, it is impossible to imagine an action that would do more to *discourage* commercial negotiations than a regulatory order purporting to freeze Verizon MA's regulatory obligations in place. Such an action would eliminate CLECs' incentive to engage in serious negotiations.

In any event, while the CLECs' request likely will be mooted by the interim rules that the FCC is expected to release shortly, Verizon MA notes that the vast majority of state commissions to consider the question have — like the Department — *rejected*

requests for identical standstill orders. These include state commissions in California,[26] Florida,[27] Georgia,[28] Louisiana,[29] New Hampshire,[30] New York,[31] North Carolina,[32] Ohio,[33] Oregon,[34] South Carolina,[35] Tennessee,[36] Utah,[37] Vermont,[38] and Virginia.[39] Verizon MA will not repeat here the arguments raised in its June 10, 2004, opposition to the CLECs' prior requests for a standstill order, but notes that no legal developments in the past two months have called any of those arguments into question.

Briefing Question 4

> Should the Department seek a declaratory ruling from the FCC as to whether the BA/GTE Merger Order requires Verizon to continue to provide mass market switching, UNE-P, dedicated transport, and high capacity loops at TELRIC?

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26 *See* Administrative Law Judge's Ruling Denying Motion, R.95-04-043, I.95-04-044, at 7 (Cal. Pub. Utils. Comm'n June 25, 2004).

27 *See* Order on Motions To Hold in Abeyance, Docket No. 040156-TP, Order No. PSC-04-0578-PCO-TP, at 6 (Fla. Pub. Serv. Comm'n June 8, 2004).

28 *See* Order Dismissing Petition, Docket No. 18889-U (Ga. Pub. Serv. Comm'n June 1, 2004).

29 *See* Minutes from Open Session at 4 (La. Pub. Serv. Comm'n June 9, 2004).

30 *See* Letter Ruling, DT 04-107 (N.H. Pub. Utils. Comm'n June 11, 2004).

31 *See* Ruling Granting Motions for Consolidation and To Hold Proceeding in Abeyance, Cases 04-C-0314 & 04-C-0318, at 7-8 (N.Y. Pub. Serv. Comm'n June 9, 2004).

32 *See* Order Denying Emergency Relief, Docket No. P-100, Sub 133t, at 1-2 (N.C. Utils. Comm'n June 11, 2004).

33 *See* Entry on Rehearing, Case Nos. 03-2040-TP-COI *et al.*, ¶ 15 (Ohio Pub. Utils. Comm'n July 28, 2004).

34 *See* Order Denying Petition for Clarification, ARB 531, at 6 (Or. Pub. Util. Comm'n June 30, 2004).

35 *See* Open Meeting of Commission (S.C. Pub. Serv. Comm'n June 22, 2004).

36 *See* Transcript of Authority Conference, Docket No. 04-00158, at 34-35 (Tenn. Reg. Auth. June 7, 2004).

37 *See* Order Denying Joint CLEC Motion, Docket No. 03-999-04, at 2-3 (Utah Pub. Serv. Comm'n June 14, 2004).

38 *See* Order Re: Motion To Hold Proceeding in Abeyance Until June 15, 2004, Docket No. 6932, at 2-3 (Vt. Pub. Serv. Bd. May 26, 2004).

39 Order, Case No. PUC-2204-00073 and Case No. PUC 2204-00074 (Va. State Corp. Comm'n July 19, 2004).

Reply Comments on Briefing Question 4

Numerous CLECs also repeat their arguments that a condition imposed in the *Bell Atlantic/GTE Merger Order* requires Verizon MA to continue providing UNEs pursuant to rules established in the *UNE Remand Order* and the *Line Sharing Order*, even though those rules were vacated *eighteen months ago*. AT&T Response at 44-45; Sprint Response at 7-8; MCI Response at 6; ARC Response at 6-8; Joint CLECs Response at 6-7. As Verizon MA explained in its July 30th Comments in this proceeding and in its April 9th response to various motions to dismiss in D.T.E. 04-33, the vacatur of those orders terminated the merger condition on which the CLECs rely. In any event, that merger condition would have terminated a few months later pursuant to the sunset clause. Verizon MA will not repeat those arguments here.

However, Verizon MA notes that AT&T and other parties have recently raised the same arguments they raise here before the FCC in CC Docket No. 98-184. There is no reason for the Department to take any further action when the issue has already been presented to the FCC. Indeed, as the FCC made clear, enforcement of the merger conditions is the *FCC's* responsibility, not the Department's. *See Bell Atlantic/GTE Merger Order*, 15 FCC Rcd at 14146-47, ¶ 256 ("If Bell Atlantic/GTE does not . . . perform each of the conditions, . . . *we must take action* to ensure that the merger remains beneficial to the public.") (emphasis added).

Briefing Question 5

> Is the D.C. Circuit Court's decision in USTA II a "change of law" affecting carriers' existing interconnection agreements?

Reply Comments on Briefing Question 5

As explained above and discussed in detail Verizon MA's July 30th Comments, the *USTA II* decision does not constitute a "change of law." The parties raise no new arguments in this regard that Verizon MA is compelled to address herein.

Briefing Question 6

> Does § 271 of the Telecom Act require Verizon either directly or indirectly, by virtue of the trade-offs under the Act, to continue to provide delisted UNEs at TELRIC?

Reply Comments on Briefing Question 6

The FCC has construed Section 271 to impose an obligation on BOCs, such as Verizon MA, independent of their obligation to provide UNEs under Section 251(c)(3), to provide access to "loop[s]," "transport," "switching," and "databases and associated signaling." 47 U.S.C. § 271(c)(2)(B)(iv)-(vi), (x); *see Triennial Review Order* at ¶¶ 653-59. A number of CLECs contend that the Department can enforce Verizon MA's obligation to provide these "271 elements" and, moreover, can do so by requiring Verizon MA to provide these elements in interconnection agreements and at TELRIC rates.[40] *See* AT&T Response at 23-26; Joint CLECs Response at 13-15, 17-20; MCI

[40] Contrary to Covad's claim (Covad Response at 4-8), the obligation in Checklist Item 4 does not require Verizon MA to continue to offer *line sharing*, but instead plainly requires Verizon MA to provide only an entire loop, in contrast to Checklist Item 2, which requires a BOC to provide access to network elements, including their features, functions, and capabilities. The FCC determined that competing carriers are not "impaired" without access to the high frequency portion of the loop ("HFPL") and, therefore, line sharing cannot be required to be provided as a UNE under Section 251 of the Act. 47 U.S.C. § 251(c)(3); *Triennial Review Order*, ¶ 260. The FCC has preempted state agencies from overriding the FCC's directives on line sharing, and nothing in the Act or state law gives the Department authority to ignore the FCC's determination, as Covad argues. In any event, as explained above, the FCC – not the state commissions - has exclusive jurisdiction to implement Section 271.

Response at 5, 7; Sprint Response at 9-10; ARC at 8-9. These CLECs are wrong, for the reasons set forth below.[41]

The FCC has held, that Congress granted "*sole authority* to the [FCC] to administer . . . section 271" and intended that the FCC exercise "*exclusive authority* . . . over the section 271 process." *InterLATA Boundary Order*, at ¶¶ 17-18 (emphases added). Courts have likewise held that "Congress has clearly charged the FCC, and *not the State commissions*," with assessing BOC's compliance with section 271. *See, e.g.*, *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added). And the text of Section 271 is replete with references to the FCC's duties. 47 U.S.C. § 271(d)(3), (4), (6).

By contrast, the only role Congress identified for state commissions is derivative of a task Congress assigned to the FCC. Thus, Section 271(d)(2)(B) provides that, with respect to an "application" for long-distance approval, "the *[FCC] shall* consult with the State commission of [that] State" so that the FCC (not the state commission) can "verify the compliance of the Bell operating company with the requirements of []section [271](c)." *Id.* at § 271(d)(2)(B) (emphasis added). Congress also gave state commissions no role *after* approval of such an application, and the FCC has never held that it has the obligation to consult with a state commission before ruling on a complaint under section 271(d)(6). State commissions therefore have no authority to "parlay [their] limited role in issuing a recommendation under section 271 . . . into an opportunity to issue an order" — whether under federal law or "ostensibly under state law" — "dictating conditions on the provision" of 271 elements. *Indiana Bell Tel. Co. v. Indiana Util. Regulatory*

[41] These issues are pending before the FCC in WC Docket 04-245, where many of these same CLECs are presenting the same arguments to the FCC. The comment cycle for that proceeding was complete on August 16, 2004.

Comm'n, 359 F.3d 493, 497 (7th Cir. 2004). Such efforts are preempted because they "bump[] up against" the procedures that are "spelled out in some detail in sections 251 and 252" and "interfere[] with the method the Act sets out" in Section 271. *Id.*

The detailed procedures in Sections 251 and 252, moreover, confirm that state commissions have no authority to regulate 271 elements. To the extent those sections impose obligations on incumbents or grant authority to state commissions, they are expressly tied to network elements that must be provided as UNEs under Section 251. Thus, state commission authority over interconnection agreements is triggered by "a request . . . *pursuant to section 251*" and where "negotiation[s] *under this section*" are unsuccessful either party "may petition a State commission to arbitrate any open issues." 47 U.S.C. § 252(a)(1), (b)(1) (emphases added); *see also id.* § 252(c)(1) (state commission must resolve open issues consistent with "the requirements of section 251"); *id.* § 252(e)(2)(B) (state commission may reject arbitrated agreement that "does not meet the requirements of section 251"). Furthermore, Section 251(c)(1) obligates incumbents to negotiate — and, if necessary, arbitrate pursuant to Section 252 — only "terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of []section [251](b) and [(c)]." *Id.* § 251(c)(1). Based on these provisions, the FCC has held that "*only* those agreements that contain an ongoing obligation *relating to section 251(b) or (c)*" are "interconnection agreement[s]" covered by Section 252. *Qwest Declaratory Ruling* at ¶ 8 & n.26 (emphases added). Courts have likewise held that the 1996 Act establishes "only a limited number of issues on which incumbents are mandated to negotiate." *See MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

With respect to state commissions' authority to set rates, Section 252(d)(1) is similarly "quite specific" and "*only* applies for the purposes of implementation of section 251(c)(3)." *Triennial Review Order* ¶ 657 (emphasis added). The FCC's conclusion was compelled by the text of Section 252, which authorizes state commissions, in arbitrating interconnection agreements, to establish rates only "for network elements according to []section [252](d)," which in turn authorizes "[d]eterminations by a State commission" of the "rate for network elements *for purposes of []section [251](c)(3)*." 47 U.S.C. § 252(c)(2), (d)(1) (emphasis added). Congress made no comparable delegation of rate-setting authority to state commission with respect to 271 elements and there is "*no serious argument*" that the UNE pricing regime "appl[ies] to unbundling pursuant to § 271." *USTA II*, 359 F.3d at 589 (emphasis added). And because Congress gave the FCC — and the FCC alone — authority to determine whether a BOC complies with section 271, that authority rests exclusively with the FCC. *See USTA II*, 359 F.3d at 565. Indeed, the Department has already recognized this basic point.[42]

Exercising its authority to implement Section 271, the FCC has ruled that *federal* law — namely, Sections 201 and 202 — establishes the standard that BOCs must meet in offering access to 271 elements. *See Triennial Review Order* ¶ 656; *UNE Remand Order* ¶ 470; *USTA II*, 359 F.3d at 588-90. Interpreting that federal law standard, the FCC has held, moreover, that "TELRIC pricing" or other "forward-looking pric[ing]" for 271 elements would be "*counterproductive*" (*UNE Remand Order* ¶ 473 (emphasis added)) and is "*no[t] necessary* to protect the public interest" (*Triennial Review Order* ¶ 656

[42] In D.T.E. 03-59, the Department held that it "does not have jurisdiction to enforce unbundling obligations under Section 271 of the Telecommunications Act of 1996." *Order* at 1-2 (January 23, 2004), affirming *Order Closing Investigation*, at 19 (November 24, 2003).

(emphasis added)). Instead, Sections 201 and 202 require nothing more than that "the market price should prevail" — "as opposed to a regulated rate." *UNE Remand Order* ¶ 473.

The FCC's determinations preempt any contrary state commission ruling attempting to establish a "regulated rate" — let alone a TELRIC rate — for 271 elements. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 872, 881 (2000) (states may not depart from "deliberately imposed" federal standards); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 155 (1982) (federal regulation that "consciously has chosen not to mandate" particular action preempts state law depriving an industry "of the 'flexibility' given it by [federal law]"). State-by-state establishment of rates, terms, and conditions for 271 elements, moreover, also conflicts with Sections 201 and 202, by yielding "patchwork contracts" and impeding the negotiation of multi-state, voluntary commercial agreements to provide 271 elements. *See Boomer v. AT&T Corp.*, 309 F.3d 404, 418-20 (7th Cir. 2002). And the FCC has recognized that extending the procedural requirements in Section 252 to cover agreements that implement obligations other than those in Section 251(b) and (c) would raise "unnecessary regulatory impediments to commercial relations between incumbent and competitive LECs." *Qwest Declaratory Ruling*, at ¶ 8.

Significantly, the Department has already addressed this issue and concluded that it has no authority to review or enforce Verizon MA's Section 271 obligations. As discussed above, the Department first considered the issue in D.T.E. 98-57 Phase III, where it rejected CLEC claims to take authority over Verizon MA's provision of packet switching under Section 271. The Department ruled that "the FCC, not the Department,

has authority to enforce that obligation under Section 271. 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. *Id.*" D.T.E. 98-57, *Phase III-D Order*, at 16.

The Department once again considered the issue in D.T.E. 03-59 and ruled for the second time that the FCC alone has jurisdiction to define and enforce Section 271 requirements. *See* D.T.E. 03-59, *Order Closing Investigation*, at 19 (November 25, 2003) and D.T.E 03-59-A, *Order Denying Motion of DSCI Corporation and InfoHighway Communications Corporation for Partial Clarification and Reconsideration of Order Closing Investigation*, at 7-8 (January 23, 2004). The Department concluded that:

> Freezing Verizon's rates for enterprise switching and UNE-P elements at their current TELRIC rates in the event that the Department does not petition the FCC for a waiver of its finding of no impairment for local switching for serving enterprise customers is beyond the scope of this proceeding and is unwarranted under Section 271. DSCI, InfoHighway, and Verizon agree that even if Verizon is not required to unbundle the local switching element for the enterprise market under Section 251, Verizon has an independent unbundling obligation under Section 271 (Offer of Proof at 18; Verizon Response at 10). Further, they agree that the pricing standard for elements required to be unbundled under Section 271 is the "just and reasonable" standard set forth in Sections 201 and 201 of the Act, and that market-driven rates would be considered in determining a just and reasonable rate (Offer of Proof at 18-19; Verizon Response at 10-11). The Department, however, does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271. See 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. Id.

D.T.E. 03-59, *Order Closing Investigation*, at 19.

In short, there cannot be any question that under the 1996 Act, FCC rulings, and Department decisions, Section 271 of the Act does *not* require Verizon MA to continue to provide delisted UNEs at TELRIC rates and that the FCC – not state commissions – has exclusive jurisdiction to determine and enforce Section 271 obligations.

CONCLUSION

For the foregoing reasons, the Department should reject the parties' claims that the Department has authority under the 1996 Act and/or state law to require that Verizon MA continue to provide delisted UNEs in Massachusetts. This contravenes the *USTA II* mandate and the vacatur, and fashions a new role for state commissions that is neither contemplated not allowed under federal law. Accordingly, the Department must reject the parties' proposals and enforce the FCC's and the Court's directives by allowing Verizon MA to remove the delisted UNEs from its interconnection agreements in accordance with the *Triennial Review Order* and *USTA II*.

Respectfully submitted,

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